

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

In re App.

Serial N. 78/247,326

Mark:

Cool Cat Products and Design

Filed:

May 8, 2003

Class:

18

Applicant

John D. Gullahorn

Published in the OFFICIAL GAZETTE at TM 433 on May 11, 2004

Trademark Trial and Appeal Board

U.S. Patent and Trademark Office

Madison East, Concourse Level Room C 55

600 Dulany Street

Alexandria, VA 22314

RESPONSE TO MOTION TO STRIKE TRIAL TESTIMONY

Applicant respectfully moves this Honorable Board to deny Opposer's Motion to Strike Trial Testimony of Applicant John D. Gullahorn ("Motion to Strike") in the above styled matter as the deposition of Applicant was an oral deposition conducted in accordance with TTAB §2.123, and as grounds therefore

Applicant states as follows:

On May 16, 2005, the Applicant, John D. Gullahorn, dba Cool Cat Products ("Applicant"), served notice to Opposer that testimony would be taken by oral deposition of witnesses before a court reporter, at Anchor Court reporting, in Pensacola, Florida, on Thursday, May 26, 2005. This was received in the office of Opposing counsel by Judy Betts at 11:45 am on May 18, 2005, not on May 19 as Opposing counsel claims, **Exhibit A, Exhibit B.**



Opposing counsel made no effort to contact Applicant to discuss a telephone deposition until Monday evening, May 23, 2005 when Applicant received his mail. On Tuesday morning, May 24th the Applicant's wife called the Trademark Trial and Appeal Board, and asked for information concerning the Opposer's Stipulation to Attend Deposition by Telephone ("Opposer's Stipulation"). Applicant's wife followed up with calls and voice messages regarding Opposer's Stipulation to both the interlocutory attorney, Mr. Andrew Baxley, as well as to Mr. Baxley's legal assistant, Ms. Laulita Grier. The Applicant reviewed FRCP 30(d)(3) concerning the Scheduling and Duration of the deposition...that any impediment, delay, or other conduct has frustrated the fair examination of the deponent...and after careful consideration felt that this supported his concern over his wife's distraught over the Stipulation for a phone deposition as she has hearing impairment and prefers to look at the lips of whomever is speaking to her to assist in understanding what is being said. A telephone deposition would indeed frustrate and impede his wife and himself over concern due to the possibility of a misunderstanding.

Ms. Grier returned the Applicant's wife's call from the previous day but did not know the answers to the Applicant's wife's questions regarding Opposer's Stipulation. The Applicant thereafter faxed a response to Opposing counsel at 12:45pm on May 25, 2005, which Opposing counsel claimed he received in his evening mail, **Exhibit C**. The response also included the Applicant's fax number, which Opposer's counsel denied receiving, also **Exhibit C**.

Approximately 4:00 pm that afternoon Mr. Baxley returned the Applicant's wife's phone call and stated that Opposing counsel was sending a motion to support his

telephone deposition and that the Applicant himself would need to be present to address the motion. A ruling on the motion was not made until approximately 6:00 pm on the evening before the scheduled deposition.

Opposer's counsel, who is a well-seasoned attorney with a trained staff, received his Notice of Deposition on the 18th of May at 11:45 am and waited until the 20th of May to place a letter in the mail asking for a Stipulation to Attend Applicant's Deposition by Telephone for a deposition scheduled for May 26, 2005. The letter was received by the Applicant on the night of May 23rd. Opposing counsel did not call the Applicant as he claimed on May 20th, **Exhibit D**. Instead, Opposing counsel waited until May 24th, at 1:42 pm, and then had his assistant call and leave a message with Applicant's receptionist to call her back. At this time the deposition was scheduled to begin in approximately 43 hours.

The purpose of summarizing the history leading up to Applicant's deposition is to show that Opposer is habitually less than truthful in his submissions to the Trademark Trials and Appeals Board and is habitually slow in his actions and responses on time sensitive matters that are to the detriment of Applicant.

During the telephone hearing on Opposer's Motion to Permit Opposer's Counsel to Attend Applicant's Testimony Deposition by Telephone ("Telephone Motion"), Applicant informed both the Interlocutory Attorney and Opposer that he planned to have his wife recite questions to him during his deposition and that his wife had been designated as a witness for the Applicant. At that time no objections were raised by the Opposer, who is a seasoned attorney, who was aware that the Applicant's wife was designated as a witness and was aware that he had not received filing and service of

written questions. In addition, under TTAB §114.06 if it comes to the attention of the Board that an individual who is not entitled to represent a party in a Board proceeding, the Board will notify the individual that she is not entitled to do so. As there was no actual representation of the Applicant by deposing Applicant, the Interlocutory Attorney did not identify any concern or provide any notification that the Applicant's was not entitled to conduct a deposition in such a manner during the hearing.

The Applicant is not a licensed attorney and neither he nor his wife has ever worked in the legal field as assistances, aids, etc. Applicant's wife was not trying to represent Applicant. Applicant's wife was merely assisting Applicant to enable Applicant to conduct a testimony deposition of Applicant.

Applicant Took Only Oral Testimony Depositions

The Applicant had reviewed the Federal Rules of Evidence, the Code of Federal Regulations, the TTAB rules, visited www.freeadvice.com, and reviewed as much material as he could locate on the Internet that seemed pertinent. He did note that there was a special procedure for "written questions" during a deposition but TBMP §§ 404.03(b), 404.03(c)(2) and 404.07(j) clearly state that written depositions are used in the discovery depositions of natural persons in a foreign country. Further under TBMP §2.124 depositions on written questions are actually performed by writing and submitting questions and such written questions are read verbatim by a designated officer. Because: (1) Applicants deposition was scheduled to take place in the United States; (2) questions were to be delivered orally, and not verbatim to the written document referenced, to both the witnesses and the Opposer; (3) Opposing counsel was present via telephone and able to speak and listen over the telephone; and (4) a court reporter was present to record that

which was verbally spoken, the Applicant correctly concluded that procedures for written questions did not pertain to his case.

Applicant's wife did not read questions verbatim from her outline of notes and questions as Opposer's counsel contends. Applicant's wife used an outline, something which most attorneys use when performing a deposition. The deposition was conducted orally in the United States and the spoken replies were recorded for later transcription. Even if Applicant's wife read questions from her outline of notes, such act would not disqualify an oral deposition. The TTAB rules do not prohibit the use of any notes or written documents for reference while conducting an oral deposition.

Pursuant to TBMP § 2.123(2) the deposition shall be taken in answer to questions with the questions and answers to be recorded in their regular order by the officer. In all respects Applicant's deposition was performed as an oral deposition in accordance with TBMP § 2.123 despite Opposer's counsel's attempt to mischaracterize the deposition otherwise. Because Applicant's testimony deposition was an oral deposition the manner of notice of testimony depositions by written question is moot.

Applicant's Wife Rightfully Deposed Applicant

Pursuant to TTAB §703.01 during a party's testimony period, testimony depositions are taken, **by or on behalf of the party**, of the party himself or herself. As Applicant is proceeding in this case pro se, Applicant would be effectively prohibited from conducting a testimony deposition and at a severe disadvantage if such a deposition necessarily had to be conducted by an attorney.

TTAB § 114.01 states that a party may represent itself in an ex parte or inter partes proceeding before the Board. To not allow Applicant to conduct a deposition of its

witnesses or allow Applicant to have assistance in being deposed would result in extreme prejudice against Applicant and is tantamount to prohibiting Applicant from representing itself in its proceeding before the Board.

Opposer Has Not Been Prejudiced

In contrast, Opposer was not prejudiced by the oral deposition even if such oral deposition would have been incorrectly identified as a deposition by written questions. Opposer's counsel was present for the deposition, had ample opportunity for cross-examination. Indeed during the oral testimony deposition Opposer's counsel embarked on a voracious crusade to interrupt the oral deposition, remove the individual deposing Applicant from the room and conduct his own deposition in a harassing manner.

The Opposer would not be harmed or prejudiced in any way if the Applicant or his witness used notes and an outline of questions to maintain order during the Applicants deposition. Furthermore, Opinion No. JM-110, by Jim Mattox, Attorney General of Texas, Re: authority of notaries public to take written depositions, By "written deposition," we understand you to mean a deposition taken by written questions; that is, by questions submitted to a litigant or witness in non-stenographic, written form, the answers to which are reduced to non-stenographic, written form. T.R.C.P. rule 189. An oral deposition is one whereby spoken questions are addressed to the litigant or witness and the spoken replies are recorded for later transcription. T.R.C.P. rule 199.... All participants in the Applicant's deposition were participating orally and their replies were recorded for later transcription. The Opposer has clearly taken 37 CFR §2.123(b)(2), 37 CFR § 2.123(e)(3), CFR § 2.124 and TBMP §707.03(b)(2) out of context.

The Applicant is only representing himself as his legal financial resources have been exhausted but he refuses to give up his Internet business that he has been developing over the past 5 years so that another individual can "out spend" him and buy justice. The Opposer obviously does not have any supportive evidence or merit to his Opposition and instead is trying to "win" this case by twisting technicalities and distortion of the truth, rather than have the evidence provided through deposition by the Applicant and the Opposer examined by Trial Board officials.

The deposition of the Applicant on May 26, 2005 went from 9am until 2pm. When the deposition was started, the Applicant's wife provided a page long statement concerning the deposition, which was essentially the same as the statement on page 3 of both witnesses from the Opposer's deposition. The Applicant had no knowledge of how a deposition was conducted, other than what he found on the Internet. The Applicant carefully reviewed the Opposer's deposition and noted the long statement on page 3, was found in each witness's package. Since the Opposer's deposition was handled by an experienced attorney, the Applicant concluded that this must be an important statement and rather than commit a technical error by omitting the statement the Applicant had his wife provide at the beginning of Applicant's deposition. Opposer's counsel objected to the statement, essentially his own statement. In an effort to act in good faith a copy of the statement that Applicant's wife had just spoke that had been essentially copied from page 3 of the Opposer's depositions was faxed to the Opposer for his review.

The Applicant had an organized outline of questions that he planned to use to depose his wife, and she had an outline of questions that she was to use when she was to depose him. The sole purpose of the written outline of questions was to stay organized

and move through the proceedings quickly and smoothly to the benefit of all parties. There were notes included with the questions that listed dates, names and even the serial number of a previous filing on July 20, 2002 by the Applicant for the mark. Shortly after the Applicant was asked his name for the record, Opposer's counsel asked if the Applicant was using written questions. The applicant acknowledged that he had written notes and an outline of questions. Opposer's counsel objected to the outline of written questions and notes and objected to the Applicant's wife deposing Applicant quoting Federal Rule 615, 37 CFR B(1) and TTAB Rule 7302 (g), even though this plan of the Applicants to have his wife depose Applicant by providing questions had been discussed the previous night during Opposer's Motion to Attend Deposition by Telephone. Opposer's counsel then asked for copies of the outline of notes and questions. The Applicant and his wife initially denied copies as there were notes written on the question sheets that contained some materials that the Applicant and his wife felt were confidential and personal.

Opposer's counsel indicated that the deposition could not take place if he did not have copies of the exhibits. A copy of the exhibits had been prepared for the Opposer but had not been sent to Opposer's counsel as it was not known until the previous night that Opposer's counsel was not personally attending the deposition. The Applicant was not able to find information on the U.S. Patent and Trademark web site directing him as to what his responsibilities were and how to handle this situation at that point.

Anchor Court Reporting Company offered to fax the exhibits to Opposer's counsel so that the deposition could start. After the two hours that it took for the exhibits to arrive at Opposer's counsel's office and be reviewed by him, the Applicant and his

wife decided to offer Opposing counsel copies of their outline of notes and questions and as a further effort to act in good faith told Opposer's counsel that they would not use their notes or their outline of questions during the deposition but would work off of the exhibits that they had just faxed to him. To avoid further harassment from Opposer's counsel, the Applicant also told Opposing counsel that he would have his wife sequestered during his testimony. Once his wife was sequestered, Applicant began reviewing the exhibits without the assistance of any outline of questions or notes, other than the exhibits themselves. This is very evident in the reading of Applicant's deposition. After Applicant was through deposing himself and Opposing counsel was through with deposing the Applicant, the Applicant called his wife into the room and deposed his wife. Acting in good faith neither the Applicant nor his wife were using written outlines, questions or any notes other than the exhibits while the Applicant's wife was questioned. The Applicant's wife did not use any written outlines, questions, or notes when she was deposed by Opposer.

The Opposer suffered no harm or prejudice from the initial statement provided by Applicant's wife; the same statement included in the depositions of his two witnesses. The Opposer suffered no harm or prejudice when the Applicant's wife asked the Applicant, John D. Gullahorn, to state his name. The Opposer's Motion to Strike is simply another of his embellishments and twisting of the truth in an effort to prevent the Trial Board from hearing the facts in this Opposition.

Applicant Has Suffered Prejudice

In contrast, Applicant suffered prejudice. Again, to not allow Applicant to conduct a deposition of its witnesses or allow Applicant to have assistance in being

deposed would result in extreme prejudice against Applicant and is tantamount to prohibiting Applicant from representing itself in its proceeding before the Board.

In addition, the Applicant suffered harm in the form of stress in not knowing how to get Opposer's exhibits to him. The Applicant suffered harm in the form of additional expense when he had to fax the exhibits to the Opposer through Anchor Court Reporting and incurred additional fees, as the Opposer was negligent in waiting until the evening before the deposition to file the Telephone Motion.


Conclusion

TTAB § 703(h)(3) states that a motion to strike a testimony deposition should be determined based on the relevant circumstances. Based upon the relevant circumstances as noted above, the testimony deposition of Applicant should stand. Applicant did not perform a deposition upon written questions as Opposer states. On May 26, 2005 Applicant held two properly noticed oral depositions. The Applicant's deposition clearly shows that the Applicant acted in good faith, was truthful and created no harm or prejudice for the Opposer, and that the Opposer has been dishonest and less than truthful in his communications. The Applicant respectfully requests that the Opposers Motion To Strike be denied.

Respectfully submitted,

John D. Gullahorn, dba Cool Cat Products

Date: June 17, 2005

By: 
John D. Gullahorn, dba Cool Cat Products
Applicant

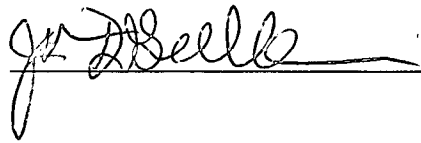
John D. Gullahorn
Cool Cat Products
4111 Calico Drive
Cantonment, FL 32533
(850) 478-CATS

CERTIFICATE OF MAILING (37 C.F.R. §1.8a)

I hereby certify that this Response to Motion to Strike Trial Testimony (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Trademark Trial and Appeal Board, U.S. Patent and Trademark Office, Madison East, Concourse Level Room C 55, 600 Dulany Street, Alexandria, VA 223142900 Crystal Drive, Arlington, VA 22202-3513.

John D. Gullahorn.
dba Cool Cat Products

Date: June 17, 2005


A handwritten signature in dark ink, appearing to read "JD Gullahorn", written over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion to Strike Trial Testimony along with exhibits has been forwarded this 17th day of June 2005, by first class mail, postage prepaid and addressed to:

Dennis T. Griggs
Griggs Bergen LLP
17950 Preston Road, Suite 1000
Dallas, Texas 75252

Angela Garcia-McSweeney
Benjamin Ostrer & Associates, PC
111 Main Street, P.O. Box 509
Chester, New York 10918

By: 

John D. Gullahorn, dba Cool Cat Products
Applicant

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>1. Article Addressed to:</p> <p><i>DANIEL GRIFFIN</i> <i>61992 Bergen Rd</i> <i>17950 Preston Rd, Suite 1000</i> <i>Dallas, TX 75252</i></p>		<p>A. Signature <input checked="" type="checkbox"/> Agent</p> <p><i>[Signature]</i> <i>[Signature]</i></p>	
<p>2. Article Number (Transfer from service)</p> <p>7004 1350 0002 1939 5915</p>		<p>B. Received by (Printed Name) <input checked="" type="checkbox"/> Addressee</p> <p><i>STACY BETTS</i> <i>518-05</i></p>	
<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If YES, enter delivery address below:</p>	
<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>		<p>PS Form 3811, August 2001 Domestic Return Receipt</p>	

APPLICANTS EXHIBIT
A



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APPLICANTS EXHIBIT
B



John D. Gullahorn
Cool Cat Products
4111 Calico Drive
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850-478-CATS phone
850-478-8355 fax

Applicants fax number

Dennis Griggs
Griggs Bergen LLP
Preston Plaza, Suite 1000
17950 Preston Road
Dallas, TX 75252
p 972-732-1001
f 972-732-9218

May 25, 2005

Re: Notice of Deposition
Perfect Foods, Inc. vs. John D. Gullahorn

Dear Mr. Griggs:

I am in receipt of your letter dated May 20, 2005 requesting deposition by telephone. At this time I am not able to stipulate to such a condition.

As you were notified in my letter dated December 30, 2004, I along my wife, Dr. Jean R. Gullahorn, will be handling this opposition. Should this situation change you will be notified appropriately.

Very truly yours,


John D. Gullahorn

RECEIVED

revised 12:45

DENNIS GRIGGS

00000/0000 VWJ 08:27 9007/92/00

APPLICANTS EXHIBIT C

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PERFECT FOODS, INC.

Opposer

v.

JOHN D. GULLAHORN

Applicant

Opposition No. 91160978

AFFIDAVIT

In re App. Serial N. 78/247,326
Mark: Cool Cat Products and Design
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AFFIDAVIT OF CATHY J. PARKER

STATE OF FLORIDA)
) SS:
COUNTY OF ESCAMBIA)

Cathy J. Parker, being duly sworn, deposes and says:

1. I am the receptionist/technician at Cat Clinic of Pensacola, in Pensacola, Florida, where the phone number is 850-478-CATS. I submit this affidavit, dated June 17, 2005, in support of Applicant's Response To Opposer's Motion to Strike Trial Testimony.

2. I am the only employee at the Cat Clinic of Pensacola, the telephone number being 850-478-CATS.

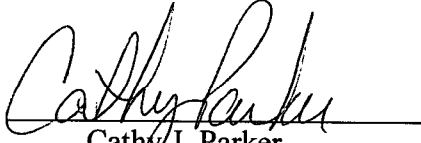
3. On Friday, May 20, 2005, I did not receive a telephone call from Mr. Dennis Griggs or from anyone identifying himself or herself as a spokesperson for Mr. Griggs.

**APPLICANTS EXHIBIT
D**

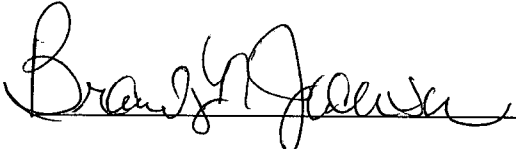
4. On Tuesday, May 24, 2005, at approximately 1:40 pm a woman identifying herself as Maria, from Attorney Dennis Griggs office, called and left a phone number and asked me to tell Mr. Gullahorn to call her back.

5. On Wednesday, May 25, 2005, at approximately 9:35 am a woman identifying herself as Maria, from Attorney Dennis Griggs office, called and left a phone number and a message for me to tell Mr. Gullahorn to call her back. The woman identified as Maria called again at approximately 9:45 am and asked for Mr. Gullahorn to call her and let her know the name of the attorney representing Mr. Gullahorn in the deposition that was scheduled for the next day.

6. I received no other contacts other than the three I have mentioned from Maria, (statement 4 and 5) from anyone identifying themselves as Dennis Griggs or an employee of Mr. Dennis Griggs.


Cathy J. Parker
FLDL P626-110-70-516-0
exp 01-16-06

Sworn to before me this 17th day of June, 2005





BRANDY N. JACKSON
Notary Public-State of FL
Comm. Exp. July 28, 2005
Comm. No. DD 40134